STATE OF MICHIGAN

SUPREME COURT

ELAINE A. HAAS and **CHARLES J. BANNON**,

Plaintiffs-Appellees,

Supreme Court No.: 123144

Court of Appeals No.: 230490

v

Circuit Court No.: 99-918983 CH

Hon. Michael J. Callahan

WADE H. DEAL and **SARAH J. DEAL,**
TRACEY L. DEAL and **J. A. DELANEY & CO.,**
a Michigan corporation, jointly and severally,

Defendants-Appellants.

PLAINTIFF-APPELLEES' BRIEF ON APPEAL

* * * ORAL ARGUMENT REQUESTED * * *

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STATEMENT OF JURISDICTION

Plaintiffs/Appellees agree with and adopt by reference the Statement of Jurisdiction set forth by Defendants/Appellants.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. PLAINTIFFS SOUGHT TO BUY A PRIVATE, SECLUDED HOME. THE FAIRBROOK PROPERTY, IMMEDIATELY BEHIND WHICH LAY A LARGE WOODED PARCEL, APPEARED TO BE AND WAS PORTRAYED BY DEFENDANTS TO BE JUST SUCH A PLACE. DEFENDANTS TOLD PLAINTIFFS THAT THE WOODS WERE LANDLOCKED TOWNSHIP PROPERTY THAT WOULD REMAIN SO UNLESS PLAINTIFFS GRANTED AN ACCESS EASEMENT, EVEN THOUGH KNOWING THAT A CEMETERY OWNED THE PROPERTY AND HAD PLANS TO STRIP THE WOODS TO CONSTRUCT OFFICES, A MAUSOLEUM AND 400 GRAVESITES. PLAINTIFFS, WHO WOULD NOT HAVE CONSIDERED BUYING THE PROPERTY HAD THEY KNOWN IT BORDERED ON A CEMETERY, LEARNED THE TRUTH ONLY AFTER THE SALE WAS COMPLETE. EXPERT ANALYSIS ESTABLISHED THAT THE CEMETERIES' PRESENCE ALONE NEGATIVELY IMPACTED THE PROPERTY'S VALUE, AND THE PLANNED CONSTRUCTION MUCH MORE SO. PLAINTIFFS SUED FOR HAVING BEEN DECEPTIVELY INDUCED BY DEFENDANTS' OMISSIONS AND MISREPRESENTATIONS INTO OFFERING TO PURCHASE THE PROPERTY AND INTO CONSUMMATING THE PURCHASE. DEFENDANTS SOUGHT SUMMARY JUDGMENT, MCR 2.116(C)(8) AND (10), CLAIMING THAT CONSTRUCTION HAD NOT BEGUN AND SO ANY INJURY WAS SPECULATIVE. GIVEN THAT PLAINTIFFS WERE SOLD SOMETHING DIFFERENT THAN THEY BARGAINED FOR AND THEIR STATED CLAIMS CONSISTENT WITH THE RECOGNIZED ESSENTIAL ELEMENTS OF EACH COUNT, DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS SUMMARY JUDGMENT?

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

A. DOES THE RECORD, READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, PRESENT SUFFICIENT EVIDENCE TO ESTABLISH ALL ELEMENTS OF THE CLAIM OF FRAUD BASED ON FALSE REPRESENTATION?

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

B. DOES THE RECORD, READ IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, SUPPORT THE CONCLUSION THAT PLAINTIFFS' RELIANCE UPON DEFENDANTS' MISREPRESENTATIONS WAS REASONABLE AND JUSTIFIABLE UNDER THE CIRCUMSTANCES?

Plaintiffs/Appellees Answer: "Yes."

Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

C. DOES THE RECORD, READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, SUPPORT THE POSITION THAT THE INJURIES SUSTAINED BY PLAINTIFFS RESULTED FROM THE LOCATION OF THE CEMETERY IMMEDIATELY ADJACENT TO THE FAIRBROOK HOME AS WELL AS THE ACTIVITIES INITIATED BY THE CEMETERY TO DEVELOP THE WOODED LOT AND SO WERE NOT RELATED TO A FUTURE EVENT?

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

D. DOES THE RECORD, READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, SUPPORT THE CONCLUSION THAT PLAINTIFFS HAVE ESTABLISHED EVIDENCE OF ALL ELEMENTS REQUIRED FOR A CLAIM OF SILENT FRAUD.

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

E. DOES THE RECORD, READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, SUPPORT THE CONSLUSION THAT PLAINTIFFS ESTABLISHED EVIDENCE OF ALL ELEMENTS REQUIRED FOR A CLAIM OF INNOCENT MISREPRESENTATION.

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals Answered: "Yes."
Defendants/Appellants Answers: "No."

II. IS IT UNCLEAR WHETHER, UNDER MICHIGAN LAW, THE STANDARD OF PROOF FOR A TORT ACTION OF FRAUD IS CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE OF THE EVIDENCE? SHOULD THIS COURT ADOPT OR CLARIFY ITS ADOPTION OF THE PREPONDERANCE STANDARD FOR TORT ACTIONS OF FRAUD? HAVE PLAINTIFFS PROVIDED A PRIMA FACIE CASE UNDER EITHER STANDARD?

Plaintiffs/Appellees Answer: "Yes."
Court of Appeals did not address this issue.
Defendants/Appellants Answers: "No."

COUNTER-STATEMENT OF FACTS[1]

In 1972, Defendants Wade Deal, a senior executive for Ford Motor Company, and his wife, Sarah, purchased a split lot located at 617 Fairbrook in Northville Township where they built an exclusive 3,500 square foot colonial home set among gently rolling hills on a secluded, beautifully wooded 2.66 acres with access to two private ponds and abundant wildlife. (Apx. 104a-105a, 111a; paragraphs 8 - 10, 14 - 15, 19, 24, 76; Haas Dep. pp. 198 – 199, 210) The only access to the property was and remains approximately a half mile of narrow dirt road and a private easement. (Apx. 1b; Deposition Exhibits 8, 9, 14, 20, 21, 22, 29)[2] The seclusion was enhanced by the parcel immediately behind the home, beginning approximately fifteen feet from the deck, where the hills and woods continued for an additional six acres. (Apx. 105a, paragraphs 8 - 10, 14 - 15, 19, 24; Apx. 162a – 163a) For more than a century, this adjacent parcel has been owned by Rural Hill Cemetery, which, in turn, is owned by the City of Northville. (Apx. 105a, paragraphs 11, 13) The Deals were able to enjoy their home without direct contact with the occupied areas of the cemetery because of the unusual layout of the roads and the specific juxtaposition of the Deal property *vis a vis* the cemetery, which rendered the developed portion of the cemetery completely obscured. (Apx., 105a – 106a, paragraphs 11, 13 - 15, 19, 24; Apx. 1b, Bannon Deposition Exhibits 8, 9, 14, 20, 21, 22) As early as 1972, however, the Deals and their architect were made aware of the cemetery's actual

[1] The facts underlying this matter were hotly contested. In addition to making myriad misrepresentations of the record which will be addressed *infra.,* Defendants present their respective views of the "facts" as if this were not the case, in violation of MCR 7.212(D)(1) and 7.212(C)(5). This matter comes to this Court following the trial court having granted summary judgment pursuant to MCR 2.116(C)(10). Within this procedural posture, Defendants' approach amounts to more than just a *pro forma* court rule violation. The record is required to be evaluated with an eye toward whether Plaintiffs' has stated a prima facie case for each claim, viewing

proximity through a survey showing that Rural Hill Cemetery owned the woods immediately behind their home. (Apx. 111a – 112a, paragraphs 70, 76 - 80; Apx. 142a; Apx. 5b, 19b; Bannon Dep. pp. 73 - 74, 88, 116 – 117; Sarah Deal Dep. Tr. p. 16; Haas Dep. pp. 43, 198 - 199, 201, 207, 211)

On February 22, 1998, the Deals listed their home through Northville Realtors, J. A. Delaney & Company, which had been in business in the area for twenty-five years and where their daughter-in-law, Defendant, Tracey Deal, worked as a real estate agent. (Apx. 105a – 106a, paragraphs 4 - 5, 22, Apx. 15b; Bannon Deposition Exhibit 24; Tracey Deal Dep. p. 101) On March 12, 1998, Tracey Deal signed a seller's agent agreement with her in-laws. (Deposition Exhibit 4, "Disclosure Regarding Real Estate Agency Relationships") The property was initially listed for $625,000.00 and was advertised as "Secluded Midst (sic) Nature's Wonders," "[w]atch deer, birds, and all kinds of wildlife right from your own kitchen." (Apx. 106a, paragraphs 26 - 27; Apx. 13b, 14b) The price was eventually reduced to $549,900.00. (Apx. 106a, paragraph 27)

In August of 1998, Plaintiff Elaine Haas viewed the exterior of the Fairbrook home as a prospective buyer with her mother. (Bannon Dep. pp. 23 - 24) She and her fiancée, Plaintiff Charles Bannon, both employed by Ford, later looked at the Fairbrook home from their car and made an appointment to view the interior. (Bannon Dep. pp. 23 - 24) On September 30, 1998, during the evening while it was still light, the couple met with realtor Tracey Deal to view the home.[3] (Haas Dep. p. 64) Ms. Deal did not disclose her seller's agency relationship to Plaintiffs. (Tracey Deal Dep. pp. 114, 117)

[3] Defendants misleadingly state that "Plaintiff Elaine Haas testified that when she first visited the property, she did not ask Wade any questions about the use of the vacant property or any property...." The reason she did not ask any questions of Wade Deal when she first visited the property was that he was not present for the showing. The first time she met Wade was on October 25th, when she did specifically ask about the property.

Viewing the Fairbrook property as they walked the grounds, and from the roads leading to the property, the home appeared to provide the unique, natural and very private setting the couple had been seeking, largely due to the several acres of wooded hills behind the house. (Apx. 106a, 108a, 111a, paragraphs 17 - 19, 26, 27, 40, 73; Apx. 4b, 5b; Haas Dep. p. 33) Once their interest became apparent, Tracey Deal told Plaintiffs that she had two other offers, imposing an urgency upon Plaintiffs' decision. (Apx. 107a, paragraphs 28, 29, 31; Apx. 136a, 152a; Haas Dep. pp. 174 - 176, 178 - 179) Plaintiffs responded by submitting an offer the following day, October 1, 1998. (Apx. 106a, paragraphs 17 – 19; Apx. 122a-123a) The offer was accepted on October 2, 1998. (Apx. 108a, paragraph 48, Apx. 123a)

On October 5th, only after the purchase agreement had been signed, Tracey Deal provided Plaintiffs with a Disclosure Regarding Real Estate Agency Relationships form, marking her relationship as both "buyer's agent" and "dual agent." (Apx. 107a, paragraphs 32 - 33, Apx. 16b; Haas Dep. pp. 67, 187; Tracey Deal Dep. pp. 114, 118, 120, 121) She did not inform Plaintiffs that she had already signed as an agent for the sellers, her in-laws. (Apx, 107a paragraphs 34, 38; Apx. 15b, 16b; Haas Dep. p. 152) Plaintiffs believed that Ms. Deal was acting as a buyer's agent, in large part because she repeatedly referred to what she termed her "fiduciary" duty to Plaintiffs. Plaintiffs understood that to mean that she had a legal and binding responsibility to fully protect their interests. (Apx. 107a, 111a, paragraphs 34, 75; Bannon Dep. pp. 23 - 24, 28 - 29, 94, 95, 97; Haas Dep. pp. 45, 52, 63, 65, 107, 152, 238, 240) The fact that Ms. Deal was the seller's daughter-in-law did not cause Plaintiffs to assume Ms. Deal would be any less forthcoming:

> "[Mr. Bannon]: I think it was clear who represented whom. I understood at the time that Tracey would have obligations to her family, and if she'd have said that there was anything that – I don't think that those obligations went beyond her duty to tell us that there was a situation with the home that had a huge impact on it." (Bannon Dep. pp. 100 - 101)

Ms. Deal took Plaintiffs to visit two additional properties without signing additional agency disclosures as to those properties. (Bannon Dep. pp. 99 - 100; Haas Dep. p. 65) She even prepared Plaintiffs' purchase offer. (Bannon Dep. p. 33) Ms. Deal never obtained her in-laws'signatures authorizing a dual agency as required by statute to legally effectuate a dual agency relationship. [4] (Apx.107a, paragraphs 35, 37, 39)

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[4] Ms. Deal held herself out at various times as a buyer's agent to Plaintiffs, as a seller's agent to the seller, and later as a dual agent. The parties vigorously contested the issue of Ms. Deal's agency relationship:

- Plaintiffs asserted in their Complaint and during deposition that they believed that Tracey Deal was a buyer's agent for them. (Apx. 105a, par. 34, Haas Dep. Tr. pp. 242-245)
- The sellers in their Answer asserted that "...Tracey Deal acted as the agent for Plaintiffs at all relevant times herein." (Answer, par. 51).
- On March 12, 1998, she executed an Agency Relationship form indicating that she was a Seller's Agent. (Response to Motion for Summary Judgment, Exhibit 9)
- On or about October 1, 1998, she signed an Agency Relationship form with Plaintiffs, placing Xs in the Buyer's Agent and Dual Agent boxes and circling the Dual Agent box. (Apx. 13b)
- In order for a dual agency relationship to be effectuated under Michigan law, the buyer and the seller must have consented in writing to the arrangement. MCL 339.2517. This never took place.

Read in a light most favorable to the nonmoving party, the record supports the conclusion that Ms. Deal was initially operating as a seller's agent and then possibly as a buyer's agent, but, due to the statutory requirements, at no time was she working as a dual agent. The trial court, in its very brief opinion from the bench, referred to Ms. Deal as "either the sellers or the broker, agent, seller's agent, plaintiffs, I mean buyer's agent." (Apx. 33a) Whether or not an agency relationship exists and, if so, which type, is a question for the jury. *Jackson v Goodman*, 69 Mich App 225; 244 NW2d 423 (1976). The Court of Appeals invaded the province of the jury by making a finding of fact that Tracey Deal was acting as a "dual agent" at all times and also erred as a matter of law by concluding that, due to this status, she had no duty to disclose to Plaintiffs all of the information she held. Under Michigan law, a dual agent must disclose "every fact about the [property] that he [knows], and nothing should have been withheld from [the buyer]." *Moore v Meade,* 213 Mich 597, 182 NW 29 (1921). Plaintiffs timely sought to bring these errors to this Court's attention in their Application for Leave to Cross-Appeal. Leave was denied. The issue is addressed herein because it comprises a significant component in the constellation of facts.

On October 5, 1998, Ms. Deal mentioned to Plaintiffs that another prospective purchaser had told her something and that she had a fiduciary duty to tell to Plaintiffs. (Haas Dep. p. 50) She proceeded to tell Plaintiffs that Rural Hill Cemetery was located in the area and might expand. Elaine specifically asked whether the expansion would ever be seen from the house. (Bannon Dep. p. 42; Haas Dep. pp. 45, 52, 75) Ms. Deal emphatically told Plaintiffs that they would never be able to see the cemetery from their property. (Apx. 108a, 109a, paragraphs 50, 56; Apx. 57b; Apx. 135a, 156a; Apx. 4b, 5b; Bannon Dep. pp. 42, 121; Haas Dep. pp. 50, 52) Plaintiffs trusted Ms. Deal and reasonably assumed that a real estate agent working in Northville would be aware of the layout of the properties in the area. (Bannon Dep. pp. 69 - 70, 123; Haas Dep. p. 72) Ms. Deal "made it sound like she was knowledgeable of what the plan was." (Bannon Dep. p. 48)

Ms. Deal showed Plaintiffs an old aerial photograph taken prior to 1974 which, unbeknownst to Plaintiffs, no longer accurately depicted the area, and told them that the expansion would involve the installation of a few gravesites and a road in the northern part of the cemetery property, an area not visible from the Fairbrook property. (Apx. 1b; Bannon Dep. pp. 42 - 45; Haas Dep. pp. 50; 52 - 53) Since Ms. Deal was making it clear that the construction would have no impact on the Fairbrook property, Ms. Haas asked her why she was telling Plaintiffs this information. Ms. Deal responded: "[b]ecause some people don't like a cemetery anywhere near them." (Haas Dep. pp. 50; 52, 77) Plaintiffs did not investigate this issue further: "Tracey told us something that we believed. She said we would never see anything from our home, so that put that point to bed." (Haas Dep. pp. 74, 75, 77, 92)

On October 25, 1998, Plaintiffs met with Wade Deal for several hours at the Fairbrook house to review the property. (Apx. 110a, paragraphs 59 - 63) Ms. Haas took notes regarding various

maintenance issues. While standing in the wooded lot behind the house, Ms. Haas specifically asked Mr. Deal who owned that property. (Apx. 110a, paragraph 60; Apx. 5b; Haas Dep. pp. 21, 183, 184) Mr. Deal responded that it was owned by the Township, that the property was landlocked and could not be developed unless Plaintiffs gave the Township an access easement. (Apx. 110a, paragraphs 60 – 61; Apx. 143a; Bannon Dep. p. 74; Haas Dep. pp. 21 - 22, 55, 59, 82 - 82, 149 - 150) Contrary to Appellant's characterization on appeal, Wade Deal's statement was a "very matter-of-fact, unambiguous statement that we believed." (Bannon Dep. p. 74; see also Haas Dep. pp. 22, 72, 84, 150) Mr. Deal's statements were reinforced by the impression already given by Defendants through their advertising and through Ms. Deal's representations that, without question, the property was simply woods to be enjoyed and would always remain as secluded as it then appeared. (Haas Dep. p. 106) Plaintiffs did not ask Mr. Deal about Tracey's earlier comments regarding the cemetery's construction plan because they had believed her when she said that the affected property was the northern area of the cemetery property, and that none of the cemetery would be visible from the house. (Haas Dep. pp. 76 - 77) During the course of the discussions on the 25th, Mr. Deal also identified the eastern boundary of the Deal property for Plaintiffs as being some twenty-five feet further into the vacant land than his actual boundary. (Haas Dep. p. 55) He then gave Plaintiffs a copy of a survey from an NBD mortgage. (Apx. 18b; Haas Dep. p. 55) Mr. Deal did not give Plaintiffs a copy of the Deal's 1972 survey showing the cemetery immediately adjacent to the Fairbrook home. Plaintiffs did not learn of the true property line until the City of Northville conducted a much more extensive survey in furtherance of the cemetery's plans. (Apx. 19b; Haas Dep. p. 56)

> "Q. [Counsel for Defendants]: You've broken this down into two issues relative to Wade and Sarah Deal. First is the omission; they didn't tell use there was a cemetery adjacent.

Issue number two is that they misrepresented or told us something that wasn't true about who owned this vacant piece of property. Those are two separate issues. They may join at some point but those are really two separate issues.

A. [Mr. Bannon]: It's the combination of the two that gave us confidence enough to not look into it and caused us to purchase the property. If he'd gone back there and said: I don't know what that is, then we'd have went and looked into it. But he stood there definitively like a father figure, this guy who had worked for Ford Motor Company as an executive, and told us in a stern, you know, friendly voice: Oh, yeah, Township of Northville. You don't need to worry about it. . ." (Bannon Dep. p. 79, see also pp. 85, 86)

Plaintiffs requested that Delaney and Ms. Deal inquire into whether the vacant land was available for purchase. (Apx. 109a, paragraph 55; Haas Dep. pp. 72, 81) Ms. Deal never provided Plaintiffs with any more information regarding the City's plans for the expansion of the cemetery. (Apx. 109a, paragraphs 52, 55)

On December 11, 1998, Plaintiffs purchased the home for $545,000.00, with $160,000 down. (Deposition Exhibit 19; Haas Dep. p. 175) Shortly after the closing, Plaintiffs delivered the Homestead Exemption Update Form to Northville Township. As they were already at the Township office, Plaintiffs asked whether the vacant property, which they believed was Township property, was available for sale. Plaintiffs were given a plat map and showed which property they were inquiring about. Plaintiffs there learned, for the first time, that that the property immediately behind their house belonged to the cemetery. They were utterly shocked and very upset. (Haas Dep. pp. 70, 85, 185)

Ms. Haas immediately paged Tracey Deal, very upset at what she had just uncovered. Ms. Deal called her back and said "I didn't know, I didn't know, I didn't know." (Haas Dep. p. 70; Tracey Deal Dep. 80, 82, 84) Ms. Deal claimed that she had always believed that the vacant property belonged to the Township and suggested that Plaintiffs "just plant some trees." (Haas Dep. p. 71)

Plaintiffs were totally stunned. (Haas Dep. p. 71) They had never imagined that the woods behind the house was or would be anything but a parcel of woods, just as they had been told. It had never occurred to them that that property was cemetery property. On Saturday, October 1st, when they had made their offer, Plaintiffs had been entirely unaware of any shared border with the cemetery. (Apx. 105a, 109a, 111a, paragraphs 17 - 19, 40, 73; Answer to Affirmative defenses, paragraph 1; Bannon Dep. p. 31) The proximity of the cemetery was not at all apparent upon Plaintiffs' visual inspection because the adjacent portion of the cemetery's property was still a vacant, heavily treed lot. (Apx. 105a, 109a, 111a, paragraphs 17 - 19, 40, 73; Apx. 2b, 4b, 5b) Plaintiffs had never noticed the cemetery's entrance on Seven Mile Road which, at that time was only a small, hand-hewn sign set back off the road at an obscured, ungated entrance approximately a mile from the house. (Apx. 6b, 7b; Haas Dep. pp. 32, 133 - 136) They had never sought out any information about the cemetery or the ownership of the lot behind the house because they had relied upon the clear statements made to them by Tracey and Wade Deal.

> "They were very definitive in what they told us. It never occurred to us to do anything other than to trust the information that we were given. . . We relied on their information, believed everything they said. Everything seemed to be fine. There was no reason to check any further. We trusted them. . ." (Haas Dep. p. 72)

Plaintiffs immediately contacted the City of Northville to determine whether they could purchase the property but were told that it was sacred ground and none of it could be sold.[5] (Haas Dep. pp. 82, 85 - 86, 110) Ms. Haas' mother went to Rural Hill Cemetery to ask about buying

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[5] Defendants flagrantly misrepresent the record by suggesting that the ownership of the property behind the Fairbrook home was unknown and/or that that property was available for purchase: "if an adjacent property owner such as herself or the cemetery... [p]rior to closing, a third party, including the Rural Hills Cemetery, could have purchased the parcel, regardless of its prior ownership." (Appellants' Brief, p. 15) There was never any possibility for a third party or the Rural Hill Cemetery to "purchase the parcel" -- Rural Hill Cemetery already owned it and had owned it since 1885. (Apx. 106a, paragraphs 11, 13; Bannon Deposition, Exhibit 17)

the adjacent land. She was told that once plots were established there, she could buy as many as she wanted. (Apx. 110a, paragraphs 67 - 69; Bannon Dep. p. 70; Haas Dep. pp. 69 - 70)

Gradually, and with considerable effort, the truth unfolded for Plaintiffs: the proximity of the cemetery had been common knowledge throughout the neighborhood (Bannon Dep. pp. 76 - 77, 86, 88; Haas Dep. p. 43); Mr. Deal had been personally acquainted with the cemetery's Sexton, Jim Allen, and the Deal's architect who had built their home had known about the cemetery, as had the Deal's son (Bannon Dep. pp. 88, 116 - 117; Haas Dep. p. 43); Tracey Deal was in possession of the 1972 survey showing the true proximity of the cemetery property behind the house but had never provided it Plaintiffs. (Apx. 142a; Apx. 19b; Bannon Dep. p. 119)

Unfortunately, the full truth turned out to be far worse than Plaintiffs could have imagined. Contrary to the Deal's representations, the woods were not landlocked but were accessible through the developed portion of the cemetery through the Seven Mile Road entrance. (Apx. 6b, 7b; Haas Dep. p. 111) Plaintiffs learned that Rural Hill Cemetery had already formally initiated action on plans to strip the woods to make room for cemetery offices, a mausoleum, a columbarium, and approximately 400 new gravesites, some as close as 15 feet from the home's back deck, with no provision for a fence or wall to be erected between the cemetery and the adjacent residences. (Apx. 105a, 111a, paragraphs 21, 70 - 73; Deposition Exhibit 23; Haas Dep. pp. 56, 69 – 70, 90, 116, 182)

Defendants, it turned out, had already been informed of these plans sometime on October 1st or during the two weeks before Plaintiffs made their offer. Tracey Deal, who at that time was working the seller's agent, had specifically been told that the woods immediately behind the Fairbrook home belonged to Rural Hill Cemetery and that actions had been taken toward removing the trees on the land immediately behind the house to install additional gravesites and

a road behind the house coming from one side of the ridge to the other. (Haas Dep. pp. 26 - 27, 62 - 63, 100 - 101, 139, 153 - 154, 185; Tracey Deal Dep. pp. 40, 41, 49) This information had been provided directly to Ms. Deal in her capacity as a seller's agent for the Deals by Patricia Thull, a prospective purchaser who had also been interested in the home. Ms. Thull told Tracy Deal that she had been given this information by representatives from the Township and the City of Northville. (Apx. 125-126a; Bannon Dep. pp. 48 - 49, 63, 66 - 67; Haas Dep. p. 33, 112; Tracey Deal Dep. pp. 40, 43) Ms. Thull also presented written questions for Ms. Deal, including the following: "Since Northville has been granted approval in funds to expand Rural Hill cemetery gravesites have the Deals any information how that will impact their land? (Haas Dep. pp. 137 - 138) In the margin, the word "unknown" had been written by Ms. Thull on the basis of Tracey Deal's response. (Apx. 125-126a, Haas Dep. pp. 139) Ms. Thull offered only $495,000, approximately $50,000.00 less than the asking price, because of the cemetery plans. (Apx. 126a Haas Dep. pp. 33, 112)

Defendants baldy misrepresent the record when, at their page 17, they state that "Tracey Deal provided the Thull information to the Plaintiffs well before the closing and before the Plaintiffs conversation with Wade Deal." This is absolutely false. Neither Tracey nor Wade Deal ever told Plaintiffs what they had learned from Ms. Thull. Plaintiffs first learned of Ms. Thull's involvement when they received her name from Defendants in response to a discovery request. Ms. Thull then visited Plaintiffs at their home, and, standing together on Ms. Haas' back deck, pointing to the woods immediately behind the house, showed Ms. Haas exactly the location she had identified to Tracey Deal as the beginning of the cemetery. (Haas Dep. pp. 28, 58, 79) Through the time when they closed, Plaintiffs remained completely unaware that cemetery property lay immediately outside the back door of the home and that gravesites were to be erected literally within a stone's throw of the

kitchen window. (Apx. 106a, 108a, 111a, paragraphs 17 - 19, 40, 46, 73; Answer to Affirmative Defenses, paragraph 1; Bannon Dep. pp. 31, 50)

Even in late October, when Mr. Deal told them that the wooded property was landlocked and owned by the Township, had Plaintiffs been told even the most basic truth -- that the Fairbrook property adjoined cemetery land less than 15 feet from the house's deck -- they would not have gone through with the sale. (Haas Dep. pp. 84 - 85)

Plaintiffs feared that the proximity and "improvement" of the adjacent cemetery property would reduce the fair market value of their new home and present security problems in addition to other problems already described. (Apx. 111a, paragraphs 72, 74; Haas dep. pp. 117, 127) Northville City Police Reports described dangerous incidents occurring in Rural Hills Cemetery, including drugs-related activity, larceny, trespassing, dogs at large, suicides, events involving "suspicious persons," -- a continuing pattern which presented a serious concern for any home adjacent to the ungated cemetery. (Apx. 23b-26b) Plaintiffs' security concerns were soon confirmed by intrusions from teenagers walking from the cemetery into their yard. (Haas Dep. p. 103) Additional concerns soon arose. Plaintiffs' property lies lower than some of the ridged portions of the cemetery immediately behind the house. Because of the hilly topography and the wetlands and ponds, their property would be seriously impacted by erosion once the trees were removed and the topography altered. (Haas Dep. pp. 113 - 114)

Plaintiffs attempted to diminish any negative impact these developments might have on the value of the home. (Haas Dep. pp. 87 - 88, 225) Plaintiffs' fears concerning the decline in property value, however, were confirmed by James Mawson, a State Certified Appraiser. (Apx.111a, paragraph 72; Apx. 20b-22b) Given the topography of the property, in order for the new gravesites not to be seen from the Fairbrook property, they would have to be subject to a

200' setback. (Haas Dep. p. 127) The City would agree to a 25'setback, but nothing more generous. (Apx. 162a – 163a)

According to Mr. Mawson's unrefuted report, even assuming that the adjacent cemetery property remained wooded as represented by Mr. Deal and Tracey Deal, merely by virtue of the knowledge that the Fairbrook property shared a border with a cemetery, the fair market value of Plaintiffs' home would be reduced by $63,000.00. (Apx. 20b-22b) After evaluating the prior three years of residential sales in the Northville area, visiting 15 metropolitan area cemeteries, and considering an exhaustive list of cemetery valuation factors, Mawson concluded that, as of February 5, 2000, if the new gravesites were 25 feet from Plaintiffs' property line, Plaintiffs' property would be diminished in value by $180,000.00, roughly *one third* of the property's total market value and, at 75 feet, the damages would still be $120,000.00. (Apx. 20b-22b)

After spending an inordinate amount of time, energy and money trying to extricate themselves from the emotionally and financially draining situation visited upon them by their having trusted Defendants, Plaintiffs finally gave up and hired an attorney to evaluate how they could remedy the situation. (Haas Dep. pp. 85, 160 - 161)

On February 24, 1999, Defendants were advised by letter of the dilemma and of the option of rescission. (Apx. 113a, paragraph 91) Defendants did not respond. (Haas Dep. p. 193)

On June 18, 1999, Plaintiffs filed a detailed, verified Complaint and jury demand in Wayne County Circuit Court, seeking compensatory and exemplary damages and attorneys fees[6] on the basis of Fraud Based on False Representation; Fraud Based on Failure to Disclose; Innocent Misrepresentation; and Violations of the Michigan Consumer Protection Act. Aside from admitting

[6] (Apx.112a – 120a, paragraphs 86 - 89, 94, 104, 105, 108, 120, 121, 133 - 135, 141)

that they knew of the cemetery, and their denial that they knew of the expansion, Defendants Wade and Sarah Deal's Answer was remarkably vague.

At the time of their depositions, Plaintiffs had already begun to look for a new home. (Haas Dep. p. 108) Pursuant to an interim order by the trial court, Plaintiffs placed their home on the market, listing the property for $675,000.00.[7] They ultimately reduced their home's price to $629,000, and still received no offer. (Apx. 129a)

Defendants Mr. and Mrs. Deal moved for summary judgment under MCR 2.116(C)(8) and (10), asserting first, that a cemetery is not an "environmental." issue and therefore need not be disclosed by the sellers under MCL §565.957; MSA §26.1286(57)[8] and, second, that the erection of gravesites within close proximity to Plaintiffs' home was only a future possibility and so Plaintiffs had not yet been injured. (Apx. 132a, 134a)

Defendants J. A. Delaney and Tracey Deal also moved for summary judgment under MCR 2.116(C)(8) and 2.116(C)(10), claiming that the cemetery's construction behind the Fairbrook home was an issue of public record and was contingent upon additional events so that, even if Ms. Deal and Delaney were aware of this information, they had no duty to disclose. Furthermore, Defendants claimed, the cemetery was "open and obvious" and, after Ms. Deal told Plaintiffs about the expansion, it was up to Plaintiffs to further investigate and, if they chose not to do so, they lost any claim. (Apx. 145a – 146a)

Plaintiffs' claim had always been that they would not have made any offer to purchase the Fairbrook home and would have stopped all transactions, even as late as closing, had they been told

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[7] This price reflected a 7% per annum increase over the purchase price, consistent with the general increase in residential property values in Northville during the preceding three years. (Apx. 129a)

[8] MCL §565.957; MSA §26.1286(57) requires sellers to inform buyers in writing of possible neighborhood nuisances such as a "Farm or farm operation in the vicinity or proximity to a landfill, airport, shooting range, etc." See discussion, *Infra.*, at Issue II.

the truth about the actual proximity of the cemetery property. (Apx. 107a, 108a, 115a, paragraphs 29, 31, 46, 47, 48, 106, 116; response to Motion for Summary Judgment, attaching Bannon Dep. pp. 48 - 49; Haas Dep. pp. 47, 84 - 85) The fact that the cemetery also actively planned to strip the woods bare and construct 400 gravesites, a mausoleum and cemetery offices immediately behind the home, simply added insult to an already significant injury.

On August 25, 2000, a hearing was held on Defendants' Motions. The trial court took judicial notice that cemeteries are "quiet neighbors" (Apx. 132a), and then expressly limited its consideration to MCR 2.116(C)(8), "because candidly, it's the safer course of action." (Apx. 133a The trial court emphasized its predisposition toward the desirability of the location of the cemetery by stating that "[t]he only way that it can be fraud is if the adjacent property usage somehow devalues your property and is pejorative to your property." (Apx. 155a-156a) The trial court then proceeded to consider facts beyond the face of the pleadings, contrary to MCR 2.116(C)(8), for example, regarding Defendant's claim that Plaintiffs must have seen the cemetery's signage: "They say well, there's a sign on Seven Mile. The property your clients bought is tangential to the cemetery they say. And I don't know what happened at the deposition with this question but your clients rode the perimeter of the property. No? They didn't?"[9] The trial judge represented to the parties that he was familiar with the Fairbrook property because he had "driven by," a proposition which would have been inappropriate for a (C)(8) analysis and which was also very questionable given that a "drive by" was and is physically impossible due to the fact that the house sits at the very end of a half-mile long, narrow dirt road and easement. Despite all well-plead and documented facts to the

[9] The depositions were attached in full with all exhibits to Plaintiffs' Appendix in Response to the Motion for Summary Judgment. Plaintiffs had never noticed the cemetery's sign on Seven Mile Road which, at that time was only a small, hand-hewn sign set back off the road at an obscured, ungated entrance which was between one half and one full mile away from the Fairbrook home, around two turns in the road. (Haas Dep. pp. 32, 133 - 136)

contrary, the trial court concluded that: "The only reason [Plaintiffs] closed is because they still want the house." (Apx. 156a) The trial court strongly suggested that Plaintiffs sue the Township and/or the City of Northville for injunctive relief. (Apx.135a, 139a-140a) The trial court stated from the bench its very brief opinion:

> "Well, the motion under C-8 is granted. He's failed to state a claim against either the sellers or the broker, agent, seller's agent, plaintiffs, I mean buyer's agent. I'm not going to continue with this. I'll just say on the basis, and I certainly hate to volunteer for this but if Ms. Haas and Mr. Bannon want to enjoin, you know, the city, obviously or the township, that would be a separate action, it would have to come back here. I assume then, because I've said what I've said on this record, that the other side is going to move to disqualify me and I don't know what'd I'd do. I mean they have to pursue their remedies... File a separate motion for costs." (Apx. 159a)

On October 30, 2000, the order granting summary judgment was entered. Plaintiffs' Motion for Reconsideration was denied on September 29, 2000.

LAW AND ARGUMENT

I. PLAINTIFFS SOUGHT TO BUY A PRIVATE, SECLUDED HOME. THE FAIRBROOK PROPERTY, IMMEDIATELY BEHIND WHICH LAY A LARGE WOODED PARCEL, APPEARED TO BE AND WAS PORTRAYED BY DEFENDANTS TO BE JUST SUCH A PLACE. DEFENDANTS TOLD PLAINTIFFS THAT THE WOODS WERE LANDLOCKED TOWNSHIP PROPERTY THAT WOULD REMAIN SO UNLESS PLAINTIFFS GRANTED AN ACCESS EASEMENT, EVEN THOUGH KNOWING THAT A CEMETERY OWNED THE PROPERTY AND HAD PLANS TO STRIP THE WOODS TO CONSTRUCT OFFICES, A MAUSOLEUM AND 400 GRAVESITES. PLAINTIFFS, WHO WOULD NOT HAVE CONSIDERED BUYING THE PROPERTY HAD THEY KNOWN IT BORDERED ON A CEMETERY, LEARNED THE TRUTH ONLY AFTER THE SALE WAS COMPLETE. EXPERT ANALYSIS ESTABLISHED THAT THE CEMETERIES' PRESENCE ALONE NEGATIVELY IMPACTED THE PROPERTY'S VALUE, AND THE PLANNED CONSTRUCTION MUCH MORE SO. PLAINTIFFS SUED FOR HAVING BEEN DECEPTIVELY INDUCED BY DEFENDANTS' OMISSIONS AND MISREPRESENTATIONS INTO OFFERING TO PURCHASE THE PROPERTY AND INTO CONSUMMATING THE PURCHASE. DEFENDANTS SOUGHT SUMMARY JUDGMENT, MCR 2.116(C)(8)

AND (10), CLAIMING THAT CONSTRUCTION HAD NOT BEGUN AND SO ANY INJURY WAS SPECULATIVE. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT UNDER EITHER MCR 2.116(C)(8) OR (10) GIVEN THAT PLAINTIFFS WERE SOLD SOMETHING DIFFERENT THAN THEY BARGAINED FOR AND THEIR STATED CLAIMS CONSISTENT WITH THE RECOGNIZED ESSENTIAL ELEMENTS OF EACH COUNT.

STANDARD OF REVIEW: Summary disposition is reviewed *de novo*. *Stehlik v Johnson* (On Rehearing), 206 Mich App 83; 520 NW2d 633 (1994). Although the trial court's decision referenced MCR 2.116(C)(8), its analysis was more consistent with MCR 2.116 (C)(10) as it went beyond the pleadings. MCR 2.116(C)(10) permits summary disposition only when, except for the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law. The court must accept as true all well-pleaded facts, along with any inferences or conclusions that may be fairly drawn from them and the facts, inferences, or conclusions must be construed most favorably to the nonmoving party. *Adams v Perry Furniture Co* (On Remand), 198 Mich App 1; 497 NW2d 514 (1993); *Ransburg v Wayne Co*, 170 Mich App 358; 427 NW2d 906 (1988). Plaintiffs have satisfied every element required for each count alleged in the and have established a *prima facie* case for each:[10] The trial court erred in granting summary disposition to Defendants.

A. THE RECORD READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS PRESENTS SUFFICIENT EVIDENCE TO ESTABLISH ALL ELEMENTS OF THE CLAIM OF FRAUD BASED ON FALSE REPRESENTATION.

Count I of Plaintiffs' Complaint alleged "Fraud Based on False Representation."

"There are six essential elements of a fraud claim: (1) that the defendant made a material representation; (2) that it was false; (3) that when the defendant made it the defendant knew that it was false, or that the defendant made it recklessly,

[10] "A 'prima facie' case means, and means no more than evidence, sufficient to justify, but not to compel, an inference of liability, if the jury so find." *Stewart v Rudner*, 349 Mich 459; 84 NW2d 816 (1957).

> without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted on by the plaintiff; (5) that the plaintiff acted in reliance on it; and (6) that the plaintiff thereby suffered injury." *Hord v E.R.I.M.,* 463 Mich 399; 617 NW2d 543 (2000).

(1) "that the defendant made a material representation." Defendants assert that statements regarding the ownership, condition and use of the woods behind the Fairbrook home are not material because that property is off-site and not subject to the sale. In general, information is material if a reasonable person would attach importance to a fact's existence or nonexistence in determining his or her choice of action in a transaction.[11] To be "material," the representation need not "relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact." *Zine v. Chrysler Corp.,* 236 Mich App 261; 600 NW2d 384 (1999) quoting *Papin v Denski,* 17 Mich App 151, 155; 169 NW2d 351 (1969), aff'd 383 Mich. 561; 177 NW2d 166 (1970). The issue of materiality is a question of fact for the jury. *Wilks v. Kempf,* 352 Mich 445, 90 NW2d 671 (1958).

The ownership, condition and use of the woods behind the Fairbrook home were material to the parties' transaction. Defendants recognized its importance to prospective purchasers and actively attempted to use this materiality to their best advantage by emphasizing the idyllic

It would be difficult to exaggerate the qualitative difference between living next to what has essentially been described as a permanent nature preserve as compared with a property stripped of trees which are replaced with above-ground headstones, offices, etc. In this particular case, the record shows that this difference would be even more extreme than might first be imagined. Rural Hill Cemetery has been distinguished as "probably one of the least regulated" cemeteries. (Apx. 135a, 156a) The gravesites in the developed portion are above ground, haphazardly placed, with apparently no restriction on decorations and no setbacks on the occupied area of the cemetery. (Apx. 162a – 163a) The graves are poorly maintained and have developed an unusual, carnival-like appearance due to the proliferation of plastic decorations surrounding the gravesites and hung from trees, including decorations for the various holidays, stuffed animals,

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> "There is yet another reason supporting the finding of a duty to disclose in this case. Even where no duty to speak exists, one who elects to speak must tell the truth when it is apparent that another may reasonably rely on the statements made. *Tobin, [v. Paparone Constr. Co.*, 349 A2d 574 (Sup Ct 1975] at 525-29, 349 *A.*2d 574. Here, the developer and broker chose to utilize the environment beyond the boundary lines of the developments to sell or enhance the saleability of the homes. The brochures and advertisements made the environment and off-site properties relevant to each sale by stating that the area was safe to go "hiking in the woods," that children could grow up in the "healthy, fresh, country air" and that country clubs and shopping malls were nearby. Having elected to use the off-site environment to induce sales, the seller and broker were obligated to disclose the existence of a landfill which could have a substantial negative impact upon the value of the homes and the quality of life in the area. Plaintiffs assert that they relied upon the developer and its agents' representations as to the character of the area and the general environment. They allege that concealment of the existence of the landfill materially affected their decision to purchase as well as the price they paid. Indeed, during the first six months of 1987, at least twenty-three potential home buyers canceled their offers to purchase when they learned that a landfill was located nearby.
>
> We reject defendants' claim that plaintiffs should be charged with constructive knowledge of the landfill because its existence was so open and notorious. We agree with the observation made in *O'Leary v. Industrial Park,* [14 Conn App 425; 542 *A*2d 333, 336 (1988)], 542 *A*2d at 337, that the doctrine of constructive knowledge cannot "serve as a shield of protection from accountability for one who makes false representations to another's damage."

balloons, etc. (Apx. 8b – 12b) The cemetery is not enclosed by a fence and the entrance is not gated and has become a haven for vandals and local drug culture after dark. (Apx. 23b-26b)

It cannot reasonably be argued that the existence of a cemetery approximately fifteen paces out one's kitchen door is immaterial to the decision to purchase that property:

> "... an atmosphere of gloom and depression is not psychologically conducive to the happiness and contentment of a family. The constant reminders of death, the depression of mind, would, in our opinion, deprive the home of that comfort and repose to which its owner is entitled by law; and it is our firm conviction that, under the circumstances here, it is unreasonable to require the plaintiffs to suffer that deprivation." *Jones v Trawick*, 75 So2d 785 (Fla.1954), accord, *Young v Brown*, 212 SC 156; 46 SE2d 673, 679 (1948). (citations omitted)

Plaintiffs testified at deposition that they would never have considered purchasing the home had they known that the property immediately behind was owned by the cemetery. The cemetery's plans to remove the trees and install gravesites within such close proximity to their back door merely exacerbated what would have been an existing objection had they been told the truth.

The fact that a condition is off-site is not determinative of its materiality in the context of fraud and misrepresentation in real estate transactions. Location is the universal benchmark of desirability and off-site conditions are very important to buyers. Numerous other jurisdictions have acknowledged this principle and have held that many off-site conditions are of sufficient materiality to affect the habitability, use, or enjoyment of the property or render the property less desirable or valuable and therefore require a seller's disclosure to prospective buyers.[13]

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[13] *See Strawn v. Canuso*, 657 A2d 420, 431 (NJ 1995) (nearby landfill sufficiently material to require seller disclosure if it affects the property value); *see also Timm v. Clement*, 574 NW2d 368, 371 (Iowa Ct App 1997) (off-site latent defects on property owned by seller sufficiently material to require seller disclosure when they may materially affect desirability or market value of property being sold); *Tobin v. Paparone Constr. Co.*, 349 A2d 574, 580 (Sup Ct 1975) (neighbor's plan to build a tennis court which would spoil the property's view sufficiently material to require seller disclosure); *O'Leary v. Industrial Park Corp.*, 14 Conn App 425; 542 A2d 333, 336 (1988), (seller was liable for fraudulent non-disclosure because the seller did not inform the buyer that the land was located too close to a town well to obtain a permit to use the

Defendants argue that, by the time Defendants made the misrepresentations complained of, Plaintiffs were already legally bound to purchase the Fairbrook home and that, therefore, the misrepresentations were immaterial. (Appellants' Brief, p. 20) Defendants neglect the misleading characterization of their advertising. More importantly, perhaps, despite the purchase agreement, Plaintiffs were not obligated to consummate the purchase. Granted, they may have lost their earnest money, but it would have allowed them to avoid the much greater damage sustained by consummating the purchase in reliance upon the Deal's misrepresentations.

To the extent that Defendants have claimed that Sarah Deal is not liable because she never met Plaintiffs, it should be noted that Sarah Deal, as a co-owner of the property, reaped the benefit of the false statements of her husband and daughter-in-law and, to the extent that Tracy Deal made such misrepresentations while she was acting as the Deal's seller's agent, those misrepresentations may be imputed to both Wade and Sarah Deal. *Chanler v Venetian Properties*

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property for its intended purpose, the construction of a herbicide storage facility); *Saslow v. Novick*, 19 Misc.2d 712, 191 NYS2d 645, 647-49 (Sup.Ct.1959), (the seller of a cigar, stationery and confection store had a duty to disclose to the buyer that the New York City Transit Authority was attempting to eliminate the subway station which was immediately adjacent to the store, the source of most of the customers for the store. The court rejected the seller's claim that the purchaser had a duty to investigate and make his own evaluation from the public records and concluded the buyer had a right to rely on the seller's implied assertion that the business would continue); *Coral Gables, Inc. v. Mayer*, 241 AD 340, 271 NYS 662, 664 (1934), (seller had a duty to disclose to the purchasers the proximity of the lots to an obnoxious business development);

Intangible conditions have been held to be sufficiently material to require disclosure, including nonphysical problems, such as a violent neighborhood, the presence of ghosts, or previous murders on-site. *See Reed v. King*, 193 Cal Rptr 3d 130, 133 (Ct App 1983) (history that home was the site of a multiple murder that home sufficiently material to require seller disclosure); *Stambovsky v. Ackley*, 572 NYS2d 672, 677 (App Div 1991) (holding seller had a duty to inform purchaser of poltergeists in the home); *Van Camp v. Bradford*, 623 NE2d 731, 739-740 (Ohio C.P. 1993) (stating that seller may be held liable for failing to disclose that rapes had occurred on and around the property when buyer specifically inquired into the safety of the neighborhood); *Alexander v. McKnight* 9 Cal. Rptr. 2d 453, 455 - 456 (Ct. App. 1992) (neighborhood problems resulting in excessive noise, e.g. late-night basketball games, parking too many cars on their property and pouring motor oil on the roof of their house sufficiently material to require seller disclosure).

Corp., 254 Mich 468; 236 NW 838 (1931). *Westinghouse Electric & Mfg. Co. v. Hubert,* 175 Mich 568; 141 NW 600 (1913). Sarah Deal also failed to disclose the true nature of the adjoining property in the disclosure statement as required under the statute addressed more fully below at Issue I. B. (Apx. 17b)

The issue of whether a party's representation regarding a particular condition is material is a question of fact for the jury. *Wilks v. Kempf,* 352 Mich 445, 90 NW2d 671 (1958).

(2) "that it was false." The representations in Defendants' advertising were misleading. The representations by Mr. Deal and Tracy Deal regarding the ownership and use of the adjoining woods were patently false. The allegations contained in Appellant's , and the reasonable inferences which might be derived therefrom meet and exceed this element. The deposition testimony and the unearthing of additional documents such as the Defendants' 1972 survey support those allegations. (Apx. 19b) The falsity of a representation is a question of fact for the jury. *Wilks v. Kempf,* 352 Mich 445; 90 NW2d 671 (1958).

(3) "that when the defendant made it the defendant knew that it was false, or that the defendant made it recklessly, without any knowledge of its truth and as a positive assertion."

Defendants claim that the Deals had no personal knowledge that the vacant property was owned by the cemetery nor of the cemetery's pending expansion. The circumstances described in detail in Plaintiffs' verified Complaint, deposition testimony, and the supporting documentation, particularly the 1972 survey, and the reasonable inferences which might be derived therefrom, however, provide ample basis for a jury to find that this element has been met. Defendants Mr. Deal and his wife lived at the same location for over twenty years and knew the cemetery's Sexton. Their architect, their son, and virtually all of their neighbors knew of the cemetery's proximity. The precise location of the cemetery was specifically shown in the

1972 survey. (Apx. 19b) Under the circumstances, it could reasonably be inferred that, sometime during the last thirty years, Mr. and Mrs. Deal became aware of who owned the property twenty paces from their back door. At a minimum, Defendants knew of the pending construction prior to Mr. Deal representing to Plaintiffs that the woods were landlocked township property. Patricia Thull submitted an affidavit attesting that she had personally told Tracey Deal about the proximity of the cemetery and its plans on October 1st. (Apx. 124-126a) At that time, Ms. Deal was employed as Wade and Sarah Deal's agent. Her knowledge is imputed to Wade and Sarah Deal regardless whether she actually gave them this information or in a timely manner. *Westinghouse Electric & Mfg. Co. v. Hubert,* 175 Mich 568; 141 NW 600 (1913).

(4) "that the defendant made it with the intention that it should be acted on by the plaintiff." Contrary to Defendants' assertion on appeal, this element is met by the Complaint, paragraph 102, and by the totality of the circumstances. There is no requirement that intent to deceive be proven with direct evidence nor have Defendants provided legal authority to that end. Fraud may be proven by circumstantial evidence. *Schmidt v Barclay*, 161 Mich 1; 125 NW 729 (1910); *Walsh v Taitt,* 142 Mich 127; 105 NW 544 (1905). This Court has held that:

> [w]henever a party engages in contractual negotiations that party attempts to persuade the other to accept the proposed terms, and vice-versa. The parties reach the goal of forming a mutually agreeable contract based upon the representations made in the course of bargaining. Thus, in situations involving privity of contract, all representations may be presumed to be made for the purpose of inducing the other party to enter the contract." *United States Fidelity & Guaranty Co. v Black,* 412 Mich 99; 313 NW2d 77 (1981), at 119.

A jury could reasonably infer from the circumstances that Defendants' advertising and misrepresentations regarding the wooded lot were intended to induce Plaintiffs to purchase the Fairbrook home.

(5) "that the plaintiff acted in reliance on it." Deposition testimony, addressed above in detail, illuminates the extent to which Plaintiffs relied upon Defendants' misrepresentations. Defendants assert that, for several reasons, the reliance was unreasonable.[14]

Contrary to Defendants' argument, a seller cannot shield himself from allegations of fraudulent misrepresentation by the inclusion of an "as is" clause or an integration clause in the contract. A fraudulently induced contract will not be enforced, and therefore, neither will its integration clause. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998), quoting 3 Corbin, Contracts, § 578, p 411. See also, *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993).

Defendants attempt to couch this element in terms of "opinion," claiming that Mr. Deal said "I think" the property belongs to the Township, injecting an uncertainty into the misrepresentation, and thereby concluding that Plaintiffs' reliance was unreasonable. According to Plaintiffs' testimony, however, Mr. Deals' statements were unambiguous. The question of which particular representation was actually made is for the jury. *Wilks v. Kempf,* 352 Mich 445; 90 NW2d 671 (1958). When there is conflicting evidence the question of credibility is left for the factfinder. *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943); *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968).

Even if the jury believes that Mr. Deal prefaced his misrepresentation with the words "I think," it does not necessarily follow that Plaintiffs' reliance was unjustifiable. A purchaser's reliance upon an opinion may be justified where the one stating his opinion is in a position of special knowledge, for example, where the speaker is the owner of a piece of land giving his opinion as to its worth or the condition of the land. See, e.g., Prosser and Keeton on Torts,

[14] The issue of whether Michigan law requires reliance to be reasonable and whether Plaintiffs' reliance in this case was reasonable is addressed below at Issue I.B.

Lawyer's Edition, 5th Ed. (West, 1984), p. 761, fn 72 and 74 and cases cited therein; see also *Hayes Construction Co v Silverthorn,* 343 Mich 421, 426-427; 72 NW2d 190 (1955), (when the seller has special knowledge on which the buyer would naturally rely, the parties do not stand on equal terms, and the buyer is justified in relying on the seller's misrepresentations).

(6) "that the plaintiff thereby suffered injury." The Mawson Appraisal clearly supports the conclusion that Plaintiffs suffered substantial economic injury in addition to the continuing disruption in their enjoyment of the property. (Apx. 20b-22b) Plaintiffs' testimony during deposition was definite: they would not have offered to purchase the property and would have stopped the transaction mid-stream, had they learned the facts after signing the purchase agreement. (Haas Dep. p. 47) Plaintiffs' subjective enjoyment of the property has been diminished as a result of the actions they took as a result of relying on Defendants' misrepresentations. Objectively, the Appraisal indicates that, even if the planned construction had never materialized, the actual market value of the property would be measurably less with a known cemetery immediately adjoining, $63,000.00 less. (Apx. 20b-22b)

Plaintiffs have established a prima facie case for fraud against Defendants. The trial court erred by granting Defendants summary disposition.

B. THE RECORD, READ IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, SUPPORTS THE CONCLUSION THAT PLAINTIFFS' RELIANCE UPON DEFENDANTS' MISREPRESENTATIONS WAS REASONABLE AND JUSTIFIABLE UNDER THE CIRCUMSTANCES.

With regard to the question whether reliance upon a misrepresentation must be "reasonable," "[i]n most jurisdictions, the plaintiff must establish that the reliance on the misrepresentation was either "reasonable" or "justifiable". A minority of jurisdictions require that plaintiff demonstrate that the reliance was both reasonable and justifiable..." 37 AmJur 2d,

"Fraud and Deceit," Section 239. The terms "reasonable" and "justifiable" appear, in some instances, to be used interchangeably and, in others, to have subtle distinctions in that "reasonable" reliance suggests an emphasis on whether the hypothetical "reasonable person" would consider the reliance logical, while "justifiable" reliance suggests more of an emphasis on the specific circumstances surrounding the reliance.

Michigan law appears to require that within a claim of fraud reliance be either justifiable or reasonable, *Nieves v Bell Industries, Inc.*, 204 Mich App 459; 517 NW2d 235(1994) (reasonable); *Home Sweet Home Investments, LLC, v Weber & Mony, P.C.*, (Mich Ct. App. Dec. Dec. 4, 2003) (justifiable). A recent panel of the Court of Appeals has stated that *Novak v Nationwide Mut. Ins. Co.,* 235 Mich App 675; 599 NW2d 546 (1999) "modifies this fifth element, requiring the reliance to be reasonable." *Podorsek v Lawyers Title Ins. Co.,* (Mich Ct. App. Dec. 11, 2003), fn 1. The requirement for reasonable or justifiable reliance appears to have been settled by reference to the requirement that, after November 1, 1990, conflicting cases in the Court of Appeals are to be resolved by following the first opinion that addresses the matter at issue. *Novak, supra.*

Defendants urge that Plaintiffs' reliance was not reasonable, that, as a matter of law Plaintiffs were required to check public records to determine whether Defendants' affirmative misrepresentations were or were not true.

Generally, a seller has no duty to disclose an objectionable material condition and there could be no "fraudulent concealment" where the condition could reasonably have been discovered upon inspection. See, e.g., *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990). *Conahan* dealt, however, with the question whether a seller had a duty to disclose known defects, and did not deal with a claim of common-law fraud where, as here, a direct inquiry from the buyers was met with a response that was false and incomplete. The more

specific rule applicable to the facts in this case requires that a seller may not lie about the condition of their home and then argue that the buyer should have discovered their deceit. It is well-settled that, if one undertakes to respond to an inquiry concerning the facts involved in a transaction, it is the person's duty to respond truthfully. *Groening v Opsata*, 323 Mich 73, 83-84; 34 NW2d 560 (1948); *Sullivan v Ulrich*, 326 Mich 218; 40 NW2d 126 (1949), at 227-230. See also *Hord v E.R.I.M.*, 463 Mich 399; 617 NW2d 543 (2000).

On October 25, 1998, Ms. Haas specifically asked Mr. Deal who owned the land. Mr. Deal unequivocally responded that the vacant land behind the home was owned by the Township, that it was landlocked, and that it could not be developed unless Plaintiffs gave the Township an access easement.

> "A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles, conceal, or fail to disclose any pertinent or material information in replying to the inquiry, or the answering party will be chargeable with fraud. This is so because where one responds to an inquiry, it is the person's duty to impart correct information. Thus, a person who responds to an inquiry is guilty of fraud if the person denies all knowledge of a fact which the person knows to exist, if the person gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though they are literally true as far as they go, or if the person fails to disclose the whole truth...
>
> In general, once a person undertakes to speak, that person assumes a duty to tell the whole truth, and to make a full and fair disclosure as to the matter about which the person assumes to speak..." 37 AmJur 2d, "Fraud and Deceit," Sections 208 and 209. See also Restatement Second, Torts, Section 529.

Once Mr. Deal undertook to respond to Ms. Haas' question, he had a duty to respond truthfully and in full. The same was required of Tracy Deal, individually and in her early role as the Deal's agent. In *Sullivan v Ulrich*, 326 Mich 218; 40 NW2d 126 (1949), this Court affirmed the trial court's decision that, once the plaintiffs had specifically asked for particular information, the real estate agent's failure to inform them of detrimental and material facts about the property amounted to

fraud and that that fraud could be imputed to the seller. See also *Chanler v Venetian Properties Corp.*, 254 Mich 468; 236 NW 838 (1931).

The illustration used in the Restatement of Torts, 2d, Section 540, is particularly instructive with regard to whether Plaintiffs' failure to investigate the veracity of Defendants' misrepresentations renders Plaintiffs' reliance "unreasonable" or "unjustified":

> "Section 540. Duty to Investigate.
>
> The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.
>
> **Comment:**
> a. The rule stated in this Section applies not only when an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction, but also when it could be made without any considerable trouble or expense. Thus it is no defense to one who has made a fraudulent statement about his financial position that his offer to submit his books to examination is rejected. On the other hand, if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in Section 541.
>
> b. The rule stated in this Section is applicable even though the fact that is fraudulently represented is required to be recorded and is in fact recorded. *The recording acts are not intended as a protection for fraudulent liars.* Their purpose is to afford a protection to persons who buy a recorded title against those who, having obtained a paper title, have failed to record it. The purpose of the statutes is fully accomplished without giving them a collateral effect that protects those who make fraudulent misrepresentations from liability.
>
> **Illustration:**
> 1. A, seeking to sell land to B, tells B that the land is free from all incumbrances. By walking across the street to the office of the register of deeds in the courthouse, B could easily learn that there is a recorded and unsatisfied mortgage on the land. B does not do so and buys the land in reliance upon A's misrepresentation. His reliance is justifiable." Restatement 2d, Torts, Section 540.

When confronted with an affirmative, albeit false, false response to a direct inquiry, a purchaser of real estate is justified in relying upon the representation and need not verify its truth

by checking public records and the seller is liable for any injury resulting from the buyer's reliance on his false statements: See, e.g., Restatement of Torts, 2d, Section 545A (1976), permitting recovery by one who justifiably relies upon fraudulent misrepresentation, notwithstanding the victim's possible contributory negligence in failing to fulfill his or her duty of investigation and diligence; "A party is justified in relying upon a representation made to it as a positive statement of fact when an investigation would be required to ascertain its falsity." 37 AmJur 2d, "Fraud and Deceit," Section 239. A plaintiff's reliance is justifiable where the defendant created a false sense of security or blocked further inquiry. 37 AmJur 2d, "Fraud and Deceit," Section 256. The fact that a victim had constructive notice of the truth from public records is no defense to fraud. 37 AmJur 2d, "Fraud and Deceit," Section 258, referencing, among other cases, *Converse v Blumrich*, 14 Mich 109 (1866).

Plaintiffs testified that they asked very specifically about the ownership and conditions of the woods behind the house and that they relied on Defendants' misrepresentations given in direct response to those inquiries as complete and truthful and, on that basis, did not pursue other information as they would otherwise have done. (Bannon Dep. pp. 35, 121; Haas Dep. pp. 47, 72) "They were very definitive in what they told us. It never occurred to us to do anything other than to trust the information that we were given. . . We relied on their information, believed everything they said. Everything seemed to be fine. There was no reason to check any further. We trusted them. . ." (Haas Dep. p. 72)

The issue of whether the failure of a real estate purchaser to investigate the veracity of a seller's affirmative misrepresentations renders the purchaser's reliance "unreasonable" was recently addressed in *M/I Schottenstein Homes, Inc. v Azam*, 813 So2d 91, 96 (Fla. 2002) under similar circumstances. In that case, purchasers who relied on a developer's misrepresentations

that a nearby parcel of land was a permanent natural reserve sued for fraud after discovering that the developer knew of the county's plans to build a school on that land. The trial court granted the developer's motion to dismiss. The intermediate appellate court affirmed in part and reversed in part. Upon granting review, the Florida Supreme Court held that there was a question of fact for the jury, notwithstanding that the allegedly misrepresented information was available in the public record.[15] The position of the Florida court is consistent with the principle that a seller should not be allowed to apply the fiction of constructive notice to avoid responsibility for active fraud.

The extent of diligent attention expected of the buyer before the defect can be characterized as unobservable to him, thus creating the seller's duty to disclose, is a question for the factfinder. See, *e.g.*, *Furla v. Jon Douglas Co.*, 76 Cal Rptr 2d 911, 917 (Ct App 1998) (an affirmative misrepresentation case in which it was held that the issue of whether the buyer unreasonably failed to protect himself in relying upon the square footage set forth in a multiple listing was a question of fact for the jury).

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[15] The Florida Supreme Court quoted at length this Court's opinion in *Bristol v Braidwood*, 28 Mich 191, 196 (1873):

> "A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two--fraud and negligence-- negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter. As the Michigan Supreme Court said many years ago:
>
> > 'There may be good, prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you, "It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told the truth; and because you trusted to my word, when you ought to have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without a remedy.'"

The issue of whether a buyer's reliance is reasonable or justified is intimately tied to the issue of whether the law recognizes a duty in the seller to disclose material conditions and under what circumstances. In this case, the seller's duty arises not only because the seller gave an affirmative response to a direct inquiry, but from other sources as well. An additional duty exists at common law given that a seller who has lived in a home for an extended period is justifiably assumed to have knowledge of the condition of the property and surrounding location superior to that of the buyer.[16] A duty to disclose defects to the buyer arises from this superior knowledge. A separate duty arises from the requirement that sellers correct any misrepresentations they have made once they become aware of the truth. *M & D, Inc. v McConkey,* 231 Mich App 22; 585 NW2d 33 (1998), *lv app den* 459 Mich 962; 590 NW2d 576 (1999). There is no question that Defendants' were made aware of the location and plans for development through their agent and daughter-in-law having been informed as early as October 1st by Patricia Thull. (Apx. 125-126a) Once that information became available, they were obligated to correct any misleading representations in their advertisements and any oral misrepresentations made by Ms. Deal, while she was acting as the seller's agent, and Mr. Deal on October 25th.

In addition, in Michigan, as in many other states, every seller of residential real estate is under a statutory duty to disclose certain categories of conditions occurring on nearby property. The mandatory sellers' disclosure statement in this State requires the seller to disclose any uses such as: "Farm or farm operation in the vicinity or proximity to a landfill, airport, shooting range, etc." MCL §565.957; MSA §26.1286(57). (Emphasis supplied). The trial court characterized the statute as "so extraordinarily vague as to defy logic" (Apx. 138a), impermissibly ignored the term "etc.", and

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[16] *See* Robert H. Shisler, *Caveat Emptor Is Alive and Well and Living in New Jersey: A New Disclosure Statute Inadequately Protects Residential Buyers*, 8 Fordham Envtl. L.J. 181, 193 (1996).

proceeded to interpret the list as restrictive, rather than permissive, thus opening the door for summary judgment.

There are no published cases interpreting MCL §565.957; MSA §26.1286(57) or establishing whether, on other grounds,[17] a seller in Michigan has a duty to disclose the existence of potentially objectionable off-site conditions which are material to the transaction but not readily observable.[18] The Michigan disclosure statute has been characterized as requiring disclosure of "neighborhood nuisances."[19] In drafting that Act, the Legislature refrained from expressly listing all potentially objectionable conditions, and intentionally left that question to be determined on a case by case basis by including the term "etc."[20] This approach is consistent with the fundamental premise that each parcel of real estate is unique, *Kent v Bell*, 374 Mich 646; 132 NW2d 601 (1965), as well as with the

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[17] Commentators have noted that, "[g]enerally speaking, the disclosure statutes supplement, but do not supercede, the common law disclosure duties." See, Roberts, Florrie Young, "Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk," 34 Conn. L. Rev. 1 (Fall, 2001).

[18] The duty of a seller to disclose possible negative off-site conditions which are not obvious has been addressed in numerous other jurisdictions the holdings of which has been capsulized at 41 ALR5th 157, "Liability of Vendor or Real-Estate Broker for Failure to Disclose Information Concerning Off-Site Conditions Affecting Property Value."

[19] Roberts, *supra*, at fn 18. This description is borne out be caselaw addressing these uses. See, e.g. *Adkins v Thomas Solvent Co.*, 440 Mich 293; 487 NW2d 715 (1992) (landfills are not considered a nuisance *per se*, even where located close to residential property); *Standen v Alpena Co*, 22 Mich App 416; 177 NW2d 657 (1970), (compensation could be due to property owners in the neighborhood of an airport so long as air traffic caused unbearable noise and property damage to nearby land.); *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 543; 158 NW2d 463 (1968), (even assuming a decrease in property values, a shooting range was not "in itself sufficient to constitute a nuisance." *Id.*, pp 542-543.)

[20] "In determining the plain meaning of [a] phrase. . . we consider not only the meaning of the phrase itself, but also 'its placement and purpose in the statutory scheme.' 'The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern,' and as far as possible, effect must be given to every word, phrase, and clause in the statute. Where, as here, the Legislature has not expressly defined terms used within a statute, we may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich 325; 603 NW2d 250 (1999). (Citations omitted; Emphasis supplied)

premise that "[b]ecause nuisance covers so many types of harm, it is difficult to articulate an encompassing definition. . ." *Adkins v Thomas Solvent Co.,* 440 Mich 293; 487 NW2d 715 (1992). The meaning of "etc." was clarified in this case through a written statement by the M.A.R. attorney. "Presumably, it is meant to include any other significant condition which could affect the property which is not otherwise referred to in the seller's disclosure statement." (Apx. 137a)

Professor Bryan Garner, editor for successive editions of Black's Law Dictionary, (6th and 7th editions) defining "etc." with his usual inimitable insight, precision and humor, suggests that "etc." requires the maximum breadth suggested by its preceding terms:

> **"etc.** A French proverb states, 'God save us from a lawyer's *et cetera.*' The point is well taken. More than four-hundred years ago, John Florio wrote: 'The heaviest thing that is, is one *Etcetera.*' It is the heaviest because it implies a quantity of things to numerous to mention." Garner, Bryan, *A Dictionary of Modern Legal Usage*, (Oxford University Press, 1987), pp. 223 - 224.

The Legislature's insertion of "etc." expands the parameters of the conditions which a seller is obligated to disclose to its furthest logical extension as consistent with those nuisances already listed. The purpose of the Act was for the buyer's protection. Both of these factors indicate that the Act should be liberally construed to require that a seller has a duty to disclose any and all adjacent or nearby uses or conditions which might be considered a nuisance.

"The gist of a private nuisance action is an interference with the occupation or use of land . . . including . . . disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." *Adkins v Thomas Solvent Co.,* 440 Mich 293; 487 NW2d 715 (1992). The negative impact of placing a cemetery next to a residence is so obvious and incontrovertible that it is properly subject to judicial

notice.[21] This Court has acknowledged that even prospective placement of gravesites on existing but vacant cemetery property in a residential area raises serious questions about a cemetery's desirablility as a neighbor to a residential use:

> "A cemetery is not the most desirable neighbor, neither is defendant's wrecking plant, and, therefore, when the owner of one complains of the undesirableness of the other, such fact should be kept in mind. . . If, and when plaintiff follows its intention of using the land, adjoining defendant's narrow strip, for cemetery purposes, then defendant's land will be undesirable for residential or mercantile purposes. *Perry Mount Park Cemetery Ass'n v Netzel*, 274 Mich 97; 264 NW 303 (1936).

The trial court and the Court of Appeals erred by ignoring the intentional inclusion of the term "etc." by the Legislature, ignoring the obvious potential for disturbance posed by the cemetery's ownership and occupation of the land immediately outside Plaintiffs' back door, and thereby ignoring the duty those factors created in Defendants to disclose the true use of the adjacent wooded property to Plaintiffs under the controlling statute.

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[21] "The plaintiffs' allegation that the cemetery would impair the value of their lands does not appear to have been proved; but we think it can be judicially noticed that a lot in a subdivision near a cemetery would at least not be as readily resalable as one not adjoining a cemetery." *Jones v Trawick*, 75 So.2d 785 (Fla.1954).

"In our opinion, under all the facts here present, it is not "fair and reasonable" to allow the defendant to use his land for a cemetery, in the face of the plaintiffs' protests. Their homes, no matter how humble, are to them their castles. They bought their lots and built their houses with the expectation that they could spend their leisure hours with their families free from business cares and anxieties. They did not buy them with the expectation of living forever in the gloomy shadow of death, and with the disquieting interruptions of their normal pastimes and peaceful pursuits occasioned by constantly recurring funeral services. . . Nor can it be denied that an atmosphere of gloom and depression is not psychologically conducive to the happiness and contentment of a family. The constant reminders of death, the depression of mind, would, in our opinion, deprive the home of that comfort and repose to which its owner is entitled by law; and it is our firm conviction that, under the circumstances here, it is unreasonable to require the plaintiffs to suffer that deprivation." *Ibid.* (Citations omitted)

C. THE RECORD READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS SUPPORTS THE POSITION THAT THE INJURIES SUSTAINED BY PLAINTIFFS RESULTED FROM THE LOCATION OF THE CEMETERY IMMEDIATELY ADJACENT TO THE FAIRBROOK HOME AS WELL AS THE ACTIVITIES INITIATED BY THE CEMETERY TO DEVELOP THE WOODED LOT AND SO WERE NOT RELATED TO A FUTURE EVENT.

During deposition and in addressing the trial court, Defendants disingenuously attempted to characterize the existence of the cemetery behind the Fairbrook home as a "future event."

Plaintiffs have been clear that they would not have made a purchase offer and would not have proceeded with the purchase of the Fairbrook home to completion had they known that the property bordered on the cemetery, developed or not. The mere location and ownership of the property by the cemetery, undeniably a present-tense condition, was sufficiently material and detrimental that Patricia Thull offered nearly $50,000 less as a result. (Apx. 126a) The Mawson Appraisal demonstrates that the mere presence of the undeveloped cemetery land adjoining the residence has a present-tense and objective negative affect on the value and saleability of the Fairbrook property.[22] (Apx. 20b-22b)

[22] Newspaper articles and public records generated since the submission of briefs in the Michigan Court of Appeals in this matter indicated that, in fact, construction is progressing - the Charter Township of Northville has amended its Zoning Ordinance to allow for subterranean graves, burial plots and monument graves as close as twenty-five feet to an existing dwelling. (Motion for Leave to Supplement Record); the City of Northville has also moved forward toward the construction project. (Motion for Leave to Supplement Record, Appendix B) There is no question that, like the Township Planning Commission, the City of Northville has also taken steps to move forward in the construction project, as is evidenced by the Pre-Bid Projects list published on June 14, 2001. Contrary to Appellees' position, public records to date appear to support the conclusion that Appellees' position that the construction will not occur is mere speculation. Contrary to Appellees' position, these public records support the conclusion that the construction is much more than "merely speculative." Plaintiffs filed a motion in the Court of Appeals requesting judicial notice of the ongoing construction. Although the motion was denied, one of the panel members nevertheless commented on the updated information and specifically inquired as to the current status.

With regard to the exacerbation of the present damages by the further development of the cemetery, the additional damages are presently actionable. This Court has held that a claim of fraud does not fail for alleging loss other than present tense monetary loss. *Mayhall v A.H. Pond Company, Inc.,* 129 Mich App 178; 341 NW2d 268 (1983), *lv app den* 422 Mich 944; 370 NW2d 311 (1985). In *Mayhall,* the plaintiff purchased a ring from a jeweler who had misleadingly advertised the ring as "perfect." Defendant sought summary judgment under the equivalent of MCR 2.116(C)(8). The trial court granted summary judgment, reasoning that plaintiff's under the Michigan Consumer Protection Act was fatally defective because it had failed to allege a monetary loss. The Court of Appeals reversed.

> "Michigan courts have had occasion to consider what constitutes injury in an action for fraud. The cases indicate that actionable fraud does not require injury to the plaintiff's pocketbook. Instead, the injury may consist in the plaintiff's unfulfilled expectations. . . ."Plaintiff's damage was immediate. The agreement that the fixtures were the property of defendants free and clear, was breached as soon as made." *Ibid*, and cases cited therein.

Under the reasoning of *Mayhall,* Plaintiffs' claims arose upon signing the purchase offer and were merely renewed upon the closing. The unrefuted Mawson Appraisal confirms that Plaintiffs have already sustained monetary loss even if no development had ever been initiated on the cemetery's woods. (Apx 20b-22b) The loss will be exacerbated when the "improvements" of tearing down the woods and installing gravesites are completed and Plaintiffs are forced to sell the Fairbrook home for substantially less than the originally projected market value. Plaintiffs were induced to part with their money, first their earnest money and then their mortgage payments, for a property which was not what they had been told it was. In other words, "the plaintiffs "have been damnified, if at all, by not getting the property they expected to get." *Id*, at 186.

The cemetery construction is underway. With regard to the additional losses Plaintiffs will inevitably incur once the cemetery development is completed, Defendants should be held liable for those damages to the extent that a jury finds that they knew of the plans and did not disclose those facts to Plaintiffs after Plaintiffs inquired. There is no Michigan case addressing a seller's liability for misrepresentation to a prospective purchaser as to unwelcome off-site conditions in the planning stage. The issue has, however, been addressed in other jurisdictions. In *Tobin v. Paparone Constr. Co.*, 349 A2d 574, 580 (Sup Ct 1975), a seller was held liable for failure to disclose a neighbor's plan to build a tennis court which would spoil the property's view. In *Cohen v. S & S Construction Co.*, 151 Cal App 3d 941; 201 Cal. Rptr. 173 (1983), in which home buyers were induced to pay a premium based on the assurances of the developer's sales agent that the Declaration of Covenants, Conditions and Restrictions protected the view from their lot and that the architectural committee would not approve fence or landscaping plans which would interfere with the view. The buyers sought damages from the developer and its sales agent for fraud and negligent misrepresentation. The appellate court in *Cohen* concluded that the stated causes of action for fraud and negligent misrepresentation because it alleged that the developer had "emphasized the development's panoramic views in its marketing and held themselves out as experts in establishing and administering homeowner associations and maintaining the aesthetic integrity of their developments." (*Id.* at p. 946.)

While, in general, actionable fraud must be predicated on a statement relating to a past or an existing fact, the circumstances in the present case involve present-tense conditions as well as ongoing loss. In addition, Michigan recognizes fraud in the inducement as an exception to the future damages rule. Fraud in the inducement occurs where a party materially misrepresents future conditions under circumstances in which, as in the present case, the assertions may

reasonably be expected to be relied upon and are relied upon. *Samuel D. Begola Servs. v. Wild Brothers*, 210 Mich App 636; 534 NW2d 217(1995), lv app den 451 Mich 876; 549 NW2d 571 (1996).

D. THE RECORD READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS SUPPORTS THE CONCLUSION THAT PLAINTIFFS HAVE ESTABLISHED EVIDENCE OF ALL ELEMENTS REQUIRED FOR A CLAIM OF SILENT FRAUD.

One who remains silent when fair dealing requires him to speak may be guilty of fraudulent concealment. *Nowicki v Podgorski*, 359 Mich 18, 32; 101 NW2d 371 (1960).

> "Fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions. . . When the circumstances surrounding a particular transaction are such as to require the giving of information, a deliberate and intentional failure to do so may properly be regarded as fraudulent in character. . . The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud." *People v Jory*, 443 Mich 403; 505 NW2d 228 (1993). (Citations omitted)

> "[I]n order to establish a claim of silent fraud, there must be evidence that the seller made some sort of representation that was false. It is not enough, as this Court in *Shimmons*[23] held, that the seller had knowledge of the defect and failed to disclose it; rather, the seller must make some type of misrepresentation.[24] A misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party." *M & D, Inc. v McConkey,* 231 Mich App 22, 585 NW2d 33 (1998), *lv app den* 459 Mich 962; 590 NW2d 576 (1999).

In the present case, as already addressed above, Defendants were under a duty to disclose the truth regarding the adjoining woods once they undertook to respond to Plaintiffs' direct inquiries, by virtue of their superior position as long-term residents of the property, and by virtue of the requirements of the seller's disclosure statue. In Michigan, a seller of property is

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[23] *Shimmons v Mortgage Corp of America,* 206 Mich App 27; 520 NW2d 670 (1994).

[24] The Michigan rule is more strict, according to commentators, than the general common law which recognizes that "[t]he seller who has lived in the home is thought to have knowledge of the condition of the property superior to that of the buyer. A duty to disclose defects to the buyer arises from this superior knowledge. The seller's silence is, therefore, the equivalent of an affirmative representation or fraud, also known as 'negative fraud.'" Roberts, *supra.*, at n. 18.

responsible for any misrepresentations made to a purchaser by a real estate agent who was working as the seller's agent. *Sullivan v Ulrich*, 326 Mich 218; 40 NW2d 126 (1949). See also *Chanler v Venetian Properties Corp.*, 254 Mich 468; 236 NW 838 (1931). In addressing the elements of silent fraud, this Court recently observed that "in every case, the fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry by the purchaser, which statements were in some way incomplete or misleading." *Hord v E.R.I.M.,* 463 Mich 399; 617 NW2d 543 (2000). (Citations omitted) *Hord* involved a plaintiff who moved to Michigan to take a job assuming the prospective employer was in good fiscal health based on the employer's financial statement of a previous year. When the company failed, plaintiff sued, claiming alternately that the company had misled him by providing financial statements which were no longer representative of the company's economic situation or that the company should have disclosed their financial difficulties. This Court reversed the Court of Appeals and the circuit court, concluding that defendant was entitled to a directed verdict as there was insufficient evidence to establish either fraudulent misrepresentation or silent fraud. This Court observed that the plaintiff had been unreasonable in inferring the present state of affairs from prior year's financial records: *Id*, at 407.

The case at bar contains two key distinctions from that case – the Deals did not merely provide obsolete or vague information to which Plaintiffs added unwarranted inferences. On the contrary, the Deals provided affirmatively false information about the then-present state of affairs. Moreover, Plaintiffs did ask, and more than once. They specifically asked Tracey Deal on October 5th if the gravesites in the cemetery's plan would be visible from the house and were told an emphatic "no." (Haas Dep. pp. 75) On October 25th, they specifically asked Mr. Deal who owned the property behind the home, and, instead of being told the truth, they were told that the

property was owned by the Township, that it was landlocked, and that it could not be developed without Plaintiffs' permission. Mr. Deal's misrepresentations were corroborated many times over by:

- the Defendants' printed advertisements that one would be able to watch deer and wildlife from the kitchen window (Apx. 13b-14b);
- the misrepresentations of Tracy Deal, Wade and Sarah Deal's daughter-in-law and sometimes agent, who, when she "informed" Plaintiffs about the proximity of the cemetery, told only half-truths;
- the obsolete aerial photo Ms. Deal showed to Plaintiffs (Apx. 1b);
- the inaccurate survey shown to Plaintiffs rather than the Defendants' 1972 survey which showed the actual location of the cemetery (Apx. 19b);
- and by the obsolete seller's disclosure form, executed in February 1998, which contained no reference to the cemetery's immediate proximity, nor to its plans for the property immediately behind the Fairbrook home. (Apx. 17b)

The totality of the facts, read in a light most favorable to Plaintiffs, suggests that the Deals engaged not only in silence, but in active concealment -- nondisclosure coupled with affirmative conduct, statements or omissions designed to prevent or frustrate the Plaintiffs from questioning the truth.

In another recent case, *M & D, Inc. v McConkey,* 231 Mich App 22; 585 NW2d 33 (1998), *lv app den* 459 Mich 962; 590 NW2d 576 (1999), the Court of Appeals addressed the element of duty. Plaintiff M&D had purchased commercial property on an "as is" basis from defendant Relenco. Defendant McConkey Real Estate handled the sale. M&D leased the property to another party for operation of a store. Two months after the store opened, it was flooded after a heavy rainfall. Evidence showed that the property had experienced flooding for many years. There was no evidence that plaintiff M&D had asked whether the property experienced any flooding, however, and the defendants never made any representation on that subject. Further, the seller (Relenco) refused to prepare a seller's disclosure statement and had

made this refusal an explicit part of the purchase agreement. The disclosure statement form stated that "Owner has never occupied this property. No representations or warranties implied as to condition. Property being sold in "as is" condition." The plaintiffs sued on various theories, including fraud. The circuit court granted defendants summary disposition on the fraud claim. The Court of Appeals held that there must also be a "legal or equitable duty of disclosure" before a failure to disclose will qualify as fraud. Such a duty was not established because the property was sold "as is," and the buyers made no inquiry regarding the condition. *Id.* at 39-40.

The law is not intended to operate as a shield to permit one to distort the truth or mislead by omission and thereby profit at another's expense. In the present case, the record supports the conclusion that it is much more likely than not that the Deals knew of the situation regarding the proximity of the cemetery and its plans on or before October 1st and that Plaintiffs made a direct inquiry to Defendants which was met with lies and half truths. For purposes of the motion for summary judgment, the trial court was obligated to assume that to be the case based on the allegations in the , the supporting documentation, and the reasonable inferences which might be drawn therefrom. *Wade v Department of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). The trial court erred in granting Defendants summary judgment.

E. THE RECORD READ IN A LIGHT MOST FAVORABLE TO PLAINTIFFS SUPPORTS THE CONSLUSION THAT PLAINTIFFS ESTABLISHED EVIDENCE OF ALL ELEMENTS REQUIRED FOR A CLAIM OF INNOCENT MISREPRESENTATION.

Michigan has adopted the minority rule as to the claim of "innocent misrepresentation:"

> "'The minority rule is followed in at least one state in a slightly more specific formulation; it is held that where an action is brought to recover for false and fraudulent misrepresentations made by one party to another [1] in a transaction between them, [2] any representations which are false in fact [3] and actually deceive the other, and [4] are relied on by him to his damage, are

actionable, irrespective of whether the person making them acted in good faith in making them, [5] where the loss of the party deceived inures to the benefit of the other.'"

* * *

Briefly then, while the traditional and innocent misrepresentation actions are substantially similar, they are also significantly different. On the one hand, the innocent misrepresentation rule differs in eliminating *scienter* and proof of the intention that the misrepresentation be acted upon. However, on the other hand, the innocent misrepresentation rule adds the requirements that the misrepresentation be made in connection with making a contract and the injury suffered by the victim must inure to the benefit of the misrepresenter. Actually what this means is this: while it is unnecessary to show that the innocent misrepresenter knew his representation was false, it is necessary to show that not only does the victim suffer injury, but also the injury must inure to the misrepresenter's benefit. It also means, and this is the major legal issue in this case, that it is unnecessary to prove separately that the representer intended that the victim rely on the misrepresentation, because the representation must be made "in a transaction between them", where the misrepresenter should realize that the misrepresentation would be relied upon.

* * *

Whenever a party engages in contractual negotiations that party attempts to persuade the other to accept the proposed terms, and vice-versa. The parties reach the goal of forming a mutually agreeable contract based upon the representations made in the course of bargaining. Thus, in situations involving privity of contract, all representations may be presumed to be made for the purpose of inducing the other party to enter the contract." *United States Fidelity & Guaranty Co. v Black,* 412 Mich 99, 117 - 119; 313 NW2d 77 (1981).

Defendants selected Plaintiffs' offer over at least two others, each of which were apparently less desirable offer, one being for $425,000.00 and the other for $495,000.00. (Bannon Dep. pp. 65 - 66) Plaintiffs, however, would not have made any offer whatsoever had they known of the proximity of the cemetery and/or its plans for the property behind the house. Defendants benefited, at a minimum, to the same extent that the other offers were for less and/or were made with less favorable contingencies than that provided by Plaintiffs.

Defendants knew of the cemetery's location – it appeared on the face of the 1972 survey completed in conjunction with the construction of the Deal's home. (Apx. 19b) However, to the

extent that a jury might find that the Deal's misrepresentation were merely an honest mistake, Plaintiffs are entitled to recover under the theory of innocent misrepresentation.

> II. IT IS UNCLEAR WHETHER UNDER MICHIGAN LAW THE STANDARD OF PROOF FOR A TORT ACTION OF FRAUD IS CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE OF THE EVIDENCE. THIS COURT SHOULD ADOPT OR CLARIFY ITS ADOPTION OF THE PREPONDERANCE STANDARD FOR TORT ACTIONS OF FRAUD. PLAINTIFFS HAVE PROVIDED A PRIMA FACIE CASE UNDER EITHER STANDARD.

STANDARD OF REVIEW: A determination of the applicable burden of proof is a question of law to be reviewed *de novo* on appeal. *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).

The Court of Appeals has noted that it is unclear what standard of proof courts should apply in fraud cases. *Id,* at 685. In the present case, Plaintiffs believe that the record, as described above, supports the existence of a genuine issue of fact sufficient to overcome Defendants' Motions for Summary Disposition regardless of which of the two standards of proof is applied.

The traditional rule for the election of a standard of proof was stated in *Grigg v Hanna*, 283 Mich 443; 278 NW 125 (1938):

> "There are but two classes of cases recognized as requiring different rules of proof; first, criminal cases, and second, civil cases, or, to speak more accurately, cases not criminal. * * * In cases not criminal, and involving no criminal judgment and punishment, the court cannot require the jury to disregard any preponderance of evidence which convinces them."

In *Mina*, the Court of Appeals considered the markedly inconsistent history of the standard of proof applied in civil fraud cases. Prior to the 1950s, this Court upheld jury instructions stating that fraud must be proved by a preponderance of the evidence, and rejected

instructions that required a greater degree of proof than preponderance of the evidence. In 1952, for the first time, and without citing any authority, it was held that fraud "must be affirmatively established by clear and convincing evidence." *Grimshaw v Aske*, 332 Mich 146, 157; 50 NW2d 866 (1952). In the late 1950s, however, fraud was again repeatedly held to be established by a preponderance of the evidence. In 1957, in *Modern Displays, Inc v Hennecke*, 350 Mich 67; 85 NW2d 80 (1957), this Court cited both the clear and convincing and preponderance of evidence standards of proof for the assertion of fraud, without distinction or discussion. Id. at 73. In 1976, this Court again stated that a plaintiff must prove a tort claim of fraud by clear and convincing evidence. *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330; 247 NW2d 813 (1976).[25]

After analyzing at length the apparent confusion in Michigan law regarding the proper standard of proof, the Court of Appeals in *Mina* upheld jury instructions requiring that the plaintiff prove fraud by a preponderance of the evidence:

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[25] Not all states have adopted the "clear and convincing" burden of proof standard for civil fraud. The federal courts have used the "clear and convincing" standard sparingly while applying the "preponderance" standard to a variety of fraud-style actions. See discussion in Rosenthal, John Terrence A, and Robert T. Alter, "Clear and Convincing to Whom? The False Claims Act and its Burden of Proof Standard: Why the Government Needs a Big Stick," 75 Notre Dame L. Rev. 1409 (May, 2000). See also, Louis L. Hammon, Hammon on Evidence 24 (1907) ("The strict measure of evidence required in criminal cases does not obtain in civil procedures... Thus a preponderance of evidence is sufficient to establish fraud ....") (footnotes omitted); 3 Clark A. Nichols, Applied Evidence 2324 (1928) ("A preponderance of the evidence is sufficient to prove fraud... Notwithstanding judicial expressions concerning necessity of clear and satisfactory proof of fraud, the code rule that a preponderance of the evidence controls in a civil case applies in a civil case, where fraud is claimed.") (footnotes omitted). "The party alleging fraud is the one who assumes the burden of establishing it, and whether he be plaintiff or defendant he must do so by a preponderance of the evidence." John W. Smith, A Treatise on the Law of Frauds and the Statute of Frauds 280 (1907). "Evidence must be clear and satisfactory." Id. at 287. On allegations of fraud, an equity court should not set aside a conveyance upon parol evidence alone unless "the preponderance of the evidence should be clear, and the evidence should be so convincing as to leave no reasonable doubt upon the mind." Philip T. Van Zile, A Treatise on Equity Pleading and Practice 411 (1904).note 115, at 410-11 (quoting *Hunter v. Hopkins*, 12 Mich. 227, 229 (1864)).

> "We are unable to say with any degree of certainty exactly what standard of proof courts should apply in fraud cases. The Supreme Court has alternately required fraud to be established by a preponderance of the evidence and by clear and convincing proof, with little consistency and no detailed analysis. While the most recent Supreme Court pronouncements regarding the question have stated that fraud must be proved by clear and convincing evidence, we think it unlikely that the Supreme Court would overrule a significant body of case law without at least mentioning that it was doing so... Unless and until the Supreme Court offers us additional guidance on this issue, we cannot find that the trial court erred in relying on *Campbell*." *Mina*, supra at 684-685.[26]

In general, civil claims need be proven by a preponderance of evidence, reflecting the policy that civil plaintiffs and defendants share the risk of an erroneous decision more equally than they would if the standard were higher. *Grigg, supra.*; Stoffelmayr, Elisabeth and Shari Seidman Diamond, "The Conflict between Precision and Flexibility in Explaining 'Beyond a Reasonable Doubt,'" 6 Psych. Pub. Pol. and L. 769 (September, 2000). Some of the variation in the standard of proof applied with regard to the tort of fraud can be explained by reference to the purposes underlying the type of relief sought. For example, in general, where a plaintiff sought equitable relief such as rescission or reformation, the stricter standard applied ostensibly, at least, due to society's interest in stability of contracts and contractual relationships.[27] Where insurers

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[26] The *Mina* opinion included no mention this Court's 1995 approval and adoption of a standard jury instruction regarding the standard of proof in tort actions for fraud based upon false representations and providing that the party asserting fraud must prove each element of fraud by "clear and convincing evidence." Michigan Standard Jury Instructions 2D 128.01, Fraud Based On False Representation (1998).

[27] "When fraud or innocent misrepresentation as a ground for rescission is successfully invoked, it will have the effect of "unmaking" an agreement in a situation where the parties clearly intended serious consequences. A plaintiff who alleges fraud or misrepresentation makes a frontal assault on the stability and integrity of contracts. For this reason, such attacks are not favored in the law. This judicial disfavor is reflected in the heightened pleading requirements for fraud and in the more demanding burden of proof placed on a plaintiff invoking fraud or innocent misrepresentation as a ground for rescission, who must prove the fraud or innocent misrepresentation by clear and convincing evidence." Kennedy, Kevin C., "Equitable Remedies and Principled Discretion: The Michigan Experience," 74 U. Det. Mercy L. Rev. 609 (Summer, 1997).

asserted fraud as an affirmative defense to enforcement of a contract, however, the less strict standard was applied. The distinction has been justified on the grounds that the insurer is asserting fraud as an affirmative defense to vitiate the contract, a distinction without a difference. This Court has also indicated that, where a quasi-criminal tort claim is made, one made on the basis of a theory having a criminal counterpart, the plaintiff should be held to at least as high a standard of proof as would be required to prove the crime.[28] This is required in recognition of

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Commentators disagree, however, as to the motivation for the equity courts' development of the higher standard:

> "[T]he equity courts' development of the "clear and convincing evidence" burden of proof standard for civil fraud cases was not the product of judicial wisdom attempting to address some peculiar nature of civil fraud matters. Rather, it was the product of the peculiar relationship between common law courts of law and courts of equity. Specifically, the "clear and convincing" burden of proof standard was the product of equity judges accounting for the differences in actionable civil fraud claims and more lax evidentiary rules of their courts vis-a-vis the law courts. Equity judges feared litigious plaintiffs using their courts as an alternative forum in which to pursue fraud claims that their brethren in the law courts would not hear." Rosenthal, *supra.* at fn 26.

[28] "While in a civil case it is only necessary to prove fraud or the commission of a crime by a preponderance of the evidence, there should, however, be testimony of sufficient weight and character to satisfy the court or jury that a fraud or a crime has been committed. *Baird v. Abbey*, 73 Mich. 354; 17 Cyc. pp. 754 and 757.

Notably, by contrast, the Michigan Consumer Protection Act, much of which is based upon classic fraud theory and which provides for either legal or equitable relief, nevertheless requires proof of a violation by only a preponderance of evidence. MCL 445.911(11)(6); MSA 19.418(11)(6).

The term "crimtort" has been coined to identify the expanding common ground between criminal and tort law:

> "The rigid doctrinal distinction between tort and criminal law is an example of the disease of 'hardening of the categories.' The separation between criminal law and tort law occurred over centuries. At early common law, tort injuries did not give rise to a distinct cause of action. Tort law was entirely encompassed by the criminal aspects of the law. At early common law, torts such as trespass 'had a basic criminal character.' However, tort law was so firmly split off from criminal law that it was viewed as an entirely different branch of the law by the middle of the nineteenth century. The result was that criminal law patrolled conduct inimical to the public order, while tort law was primarily concerned with

the societal interest in avoiding an erroneous verdict in favor of the plaintiff in regard to torts involving potentially stigmatizing punishment. Similarly, in a related area, falsity of a representation in a claim for defamation requires a clear and convincing standard because of the First Amendment interests. "The falsity requirement should be construed and applied in a manner that assures true speech will not be punished." *Locricchio v. Evening News Ass'n,* 438 Mich 84; 476 NW2d 112 (1991).

"Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could afford it." *Reddaway v. Banham*, App Cas 199, 221 (H.L. 1896). Despite the myriad ways some human beings contrive to deceive another, it is possible to carve out categories which will serve the virtues of fairness. Unlike the "clear and convincing" standard, the "preponderance of the evidence" standard results in a roughly equal allocation of the risk of error between litigants and should be applied in civil actions between private litigants unless particularly important interests or rights are at stake. Although there may be valid underlying differences among torts requiring a heightened standard of proof in certain circumstances, fraud in the context of a simple residential real estate transaction at arm's length does not belong in that category.

Public policy mitigates in favor of applying the less strict standard given that proceeding with a claim of fraud has already been substantially restricted as a practical matter by other safeguards: Plaintiffs are already required to plead with particularity, prior to even having had discovery; fraud is an intentional tort and requires proof of the defendant's intent, a substantial hurdle in many cases; purchasers of property cross the full range of resources, experience and

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rectifying the wrongs done to private individuals." Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. Mich. J.L. Reform 289, 314 n.109 (1998).

intelligence and are typically not represented by a professional, as is the seller, during the initial periods prior to closing, the period during which intentional misrepresentations may sway their decision to make an offer or to close; once a loss has occurred through a misrepresentation, plaintiffs are typically at a practical disadvantage because their attorney will be on contingency, with its attendant risk of much work and no gain, and who must often oppose more specialized and therefore more experienced insurance defense counsel who are paid by the hour, without a bilateral contingency arrangement providing an incentive for an early settlement. If, in addition to these hurdles, civil fraud cases are held to the more strict clearly erroneous standard, plaintiffs who have genuinely suffered injury as a result of justifiable reliance on intentional misrepresentation would effectively be precluded from access to the courts.

A residential real estate purchase is one of the most important transactions made in the lives of most members of the legally unsophisticated general public. According to some insurance industry estimates, two-thirds of buyers' claims against sellers and brokers involve non-disclosure of material facts.[29] The benefits of stricter standards of proof in civil fraud cases come at the cost of reduced compensation to defrauded individuals and a greater number of culpable defendants who will escape liability for damages. The law should recognize the practical consequences of the choices being made among possible standards. If courts impose a high burden of proof, few law suits will succeed. If they accept the ordinary civil burden of proof, those asserting misrepresentation will win more cases. Who benefits from making misrepresentation hard to establish? Who benefits from making it easier to establish? The impact of these choices will benefit some and hurt others. Whatever choice is made, the impact will not be random.

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[29] James D. Lawlor, Seller Beware: Burden of Disclosing Defects Shifting to Sellers, A.B.A. J., Aug. 1992, at 90.

CONCLUSION

> "The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked. It has also been frequently declared that as between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him or was guilty of negligence in so doing." 23 Am. Jur. Fraud and Deceit 146 (1939) (footnote omitted).

Based upon Defendants' affirmative misrepresentations and material omissions, Plaintiffs reasonably believed that they were purchasing a tranquil, permanently secluded property, certainly not one which would soon change from serene wooded hills to an active cemetery, complete with offices, mausoleum, columbarium and gravesites outside their kitchen window. Plaintiffs have not only been deprived of an expected advantage, they have been saddled with an undoubted disadvantage. The decline in the value of the Fairbrook home in light of proximity of the cemetery and again, in light of the imminent installation of gravesites ten paces of their back door, was established through a detailed, thorough, and uncontested Appraisal.

The trial court erred as a matter of law by failing to recognize the duty Defendants owed to Plaintiffs once the undertook to respond to Plaintiffs' direct inquiries and the duty arising out of a proper interpretation of the Seller Disclosure Act, MCLA § 565.957; MSA § 26.1286(57).

The trial court erred as a matter of law by failing to apply the *Mayhall* rule requiring that hat a claim of fraud does not fail where the damages alleged are not present-tense monetary damages.

To the extent that the trial court ruled under MCR 2.116(C)(10), it erred by impermissibly making findings of fact in the form of "judicial notice," in the form of inferences

regarding reasonableness, and by failing to construe all factual allegations, together any reasonable inferences, in Plaintiffs' favor.

RELIEF REQUESTED

Plaintiffs request this Court vacate the trial court's order granting summary judgment and remand this matter for consideration by the jury on all counts. Plaintiffs further request this Court correct the errors effectuated by the Court of Appeals' opinion to the extent that it made a factual finding that Tracy Deal was a dual agent and its erroneous legal ruling that, as such, she was not obligated to disclose what she knew to Plaintiffs.

STATEMENT REQUESTING ORAL ARGUMENT

Plaintiffs request oral argument in order to respond to any questions set forth by the judicial panel, to respond to Defendant's anticipated statements, and to address any new case law which may impact the analysis of the issues asserted on appeal.

Respectfully Submitted,

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